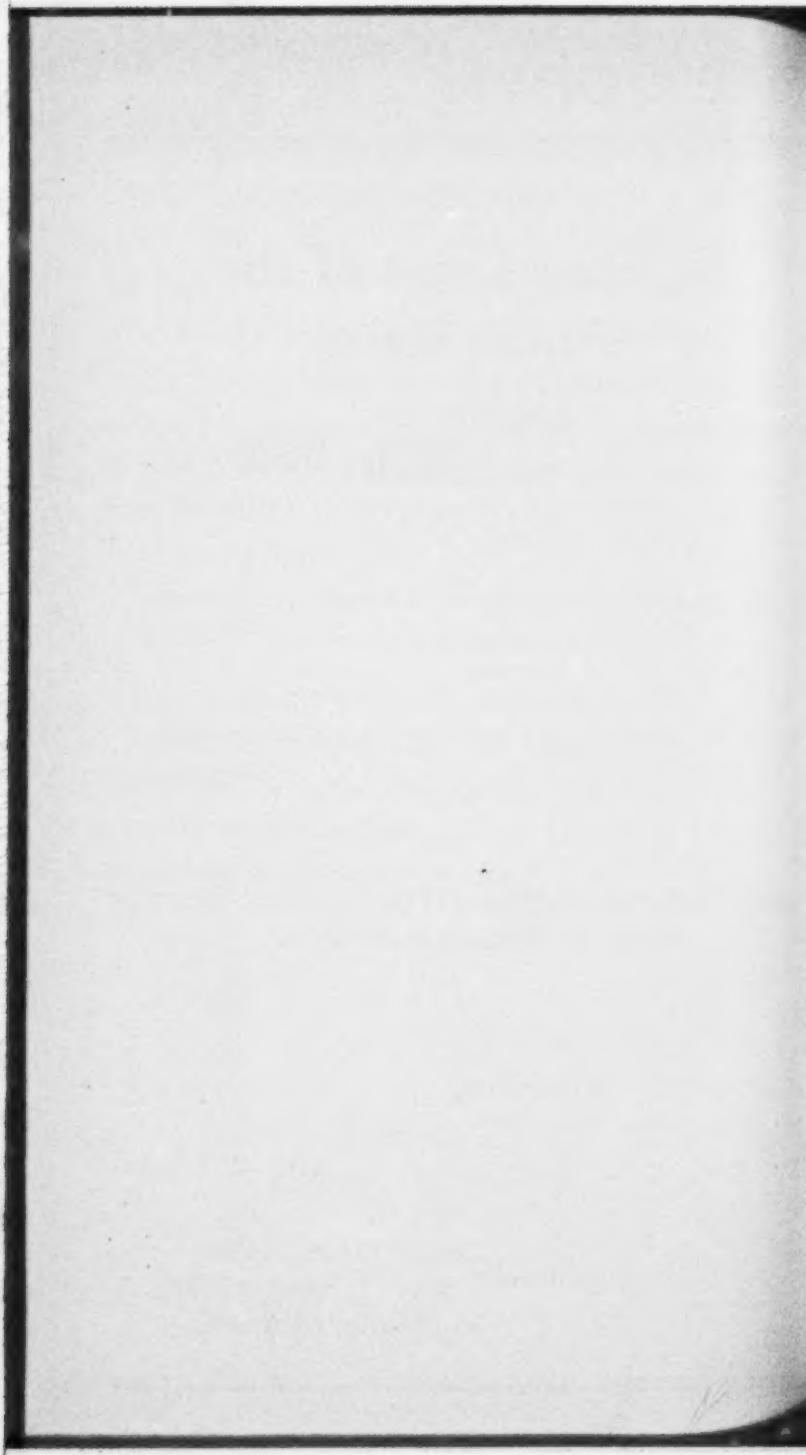

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IN THE

Supreme Court of the United States

October Term, 1928.

No. .....

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

As the court is not asked to consider any question of fact, respondent will not attempt to restate the case in accordance with its understanding of the record. The trial judge, who observed the witnesses and heard their testimony, held the evidence insufficient to justify submitting to the jury the question whether respondent set the fire. The Circuit Court of Appeals said, "It is the opinion of a majority of the Court that although the question is not free from doubt, there were facts and circumstances sufficient to call for submission to the jury" (R. 118).

It seems fair to say that it would be difficult to imagine a less substantial case than that presented by petitioner on the trial in District Court.

The reasons relied upon by petitioner for the allowance of a writ of certiorari are set forth on page 5 of the petition as follows:

> "1. The decision is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *McCullen vs. Chicago & North Western Railway Company*, 101 Fed. 66, upon the same matter.
>
> "2. The decision decides an important question of local law in conflict with applicable local decisions of the Supreme Court of the State of Washington (citing cases)."

1. Petitioner is mistaken in saying the decision decides a question of local law. The statement of the case and specifications of error show that the sole question in the case is whether there was any proof of negligence. That question is one of general law in the determination of which Federal courts are not bound by decisions of state courts.

This court has had occasion within a year to consider once more when a Federal court is required to follow the decisions of the courts of a state in which it is sitting. The following quotation from the opinion of the court in *Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company*, 276 U. S. 518, is sufficient to show that the second reason relied upon by petitioner is without substance:

> "As respects the rule of decision to be followed by federal courts, distinction has always been made between statutes of a State and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow

the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this Court. *Swift v. Tyson,* 16 Pet. 1, 19, was an action on a bill of exchange. Mr. Justice Story, writing for the Court, fully expounded § 34 of the Judiciary Act. * * * *Railroad Company v. Lockwood,* 17 Wall. 357, 366, *declined to follow the state rule as to liability of common carriers for injury of passengers. Liverpool Steam Co. v. Phoenix Ins. Co.,* 129 U. S. 397, 443, held a question concerning the validity of a contract for carriage of goods is one of general law. *Baltimore & Ohio Railroad v. Baugh,* 149 U. S. 368, 370, *so held as to the responsibility of a railroad company to its employees for personal injuries. Beutler v. Grand Trunk Railway,* 224 U. S. 85, 88, *decides who are fellow-servants as a question of general law."* (pp. 530-531.) (Italics ours.)

Not only is it well settled that questions of negligence are questions of general law, but this court has specifically held that burden of proof in a negligence case is "a matter of substance and not subject to control by laws of the several states." *New Orleans & N. E. R. R. Co. v. Harris,* 247 U. S. 367, 372.

The rules of this court in regard to certiorari provide that one of the reasons which will be considered in determining whether a writ of certiorari will be issued is that a Circuit Court of Appeals "has decided an important question of general law in a way probably untenable or in conflict with the weight of authority." If this reason is before the court, though not specifically stated in the petition, it will be sufficiently discussed in respondent's answer to the first reason stated in the petition.

2. As to the first reason relied upon, namely, that the decision is in conflict with a decision of the Circuit Court of Appeals of the Eighth Circuit, respondent's position is, first, that the

conflict is not such as to justify a writ of certiorari, and second, that the decision of the Circuit Court of Appeals of the Ninth Circuit was right and is supported by the decisions of this court and other Circuit Courts of Appeal.

The conflict is as to what constitutes negligence in a given case and what evidence is sufficient to send a case to the jury. There can be no conflict unless it be shown that the facts in the case tried in the Eighth Circuit and in this case are practically identical.

The case relied upon by petitioner is *McCullen v. Chicago & N. W. Ry. Co.*, 101 Fed. 66. The opinion was by Judge Thayer and in it he said:

> "it is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property." (p. 70.)

The statement that the rule of law was "comparatively well settled" was not justified, for there was then and is now diversity of opinion on that question. The rule in most states that have no statute creating a presumption of negligence is that none arises from proof of the setting of a fire, and such was the general rule in those states, which now have statutes, prior to the time those statutes were enacted. Furthermore there was direct evidence of negligence. Judge Thayer said:

> "With respect to the issue whether the fire in question was occasioned by a spark from one of its locomotives, the defendant offered much expert testimony to the effect that a spark could not have been emitted by either of its locomotives, and carried a distance of 302 feet from its track, which would have retained sufficient vitality to have set fire to the slats of the ventilator under the conditions which existed at the time the fire took place. On the other hand, a railroad engineer who was called by the plaintiff

testified, in substance, that under such conditions as prevailed on the day of the fire,—with the wind from the north, blowing about 10 miles an hour, and the train moving on an upgrade,—a spark might have been carried 302 feet, and might have set fire to such slats as were in the ventilator, although the ventilator was at a height of 35 feet above the ground, provided the spark arrester of either engine was at the time in a defective condition. Another witness, who met the train in question on the day of the fire a few miles east of the town of St. Lawrence, also testified that the leading or head locomotive was then emitting large sparks, which floated 264 feet from the track, as ascertained by a subsequent measurement. Another witness testified, in substance, that he had, on one occasion previous to the fire, seen sparks emitted by locomotives which were in use by the defendant company that rose to a considerable height, and floated as much as 600 feet from the track, before they expired." (pp. 68-69.)

The *McCullen case* is not a parallel case to this case, for in this the record is absolutely bare of direct evidence of negligence.

The *McCullen case* arose in South Dakota. That state has since enacted a statute under which proof of setting a fire by a locomotive creates a presumption of negligence. That the Circuit Court of Appeals of the Eighth Circuit would today in a case arising in a state which had no such statute follow its holding in the *McCullen case* cannot be affirmed with certainty as that court has since gone further than almost any other Federal court in holding the statutory presumption overcome by the evidence of the railway company, and that a verdict for defendant should be directed by the court. *Woodward v. Chicago, M. & St. P. Ry. Co.*, 145 Fed. 577.

The conflict on which petitioner relies is not merely between a decision of the Circuit Court of Appeals of the Eighth Cir-

cuit and a decision of the Circuit Court of Appeals of the Ninth Circuit, but is between a decision of the former court on one side and decisions of the Circuit Court of Appeals of the Ninth Circuit and of the Circuit Court of Appeals of the Sixth Circuit on the other. In discussing cases holding that a presumption of negligence arises from proof of setting a fire, the Circuit Court of Appeals said in the instant case, 28 Fed. (2d) 576 (R. 119):

> "But in the better considered cases in the federal courts it is held that the question is one of general law, and that it cannot be said that the mere ignition by sparks is prima facie evidence of negligence of the railroad company. Such was the opinion expressed by Judge Taft for the Circuit Court of Appeals of the Sixth Circuit in Garrett v. Southern Ry. Co., 101 F. 102, 49 L. R. A. 645, a case quite like the one at bar, where the court, after recognizing that there is contrariety of decision, cited the Nitroglycerine Case, 15 Wall 524, 21 L. Ed. 206, and invoked the principle that one who charges negligence must prove it by showing that defendant, by his act or by his omission, has violated some duty incumbent upon him which has caused the injury complained of.
>
> "Again, in Toledo, St. Louis & W. R. Co. v. Star Flouring Mills Co., 146 F. 953, the Circuit Court of Appeals, speaking through Judge Lurton, after citing decisions presenting the conflict upon the question whether evidence that a fire was started by escaping sparks constitutes, without more, a prima facie case of negligence, affirmed Garrett v. Southern Ry. Co., supra. The court held that the more logical view is that the gravamen of an action for loss of property by fire communicated by sparks is negligence, and that 'inasmuch as a railway company may lawfully use locomotives it cannot be made liable for a loss from sparks emitted, unless plaintiff shows such sparks to have been negligently emitted,' and that the burden of showing negligence is upon him who affirms it. See, also,

Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co. (C. C. A. 6) 139 F. 528, 1 L. R. A. (N. S.) 533; Louisville & Nashville R. Co. v. Bell (C. C. A. 6) 206 F. 395.

"(3) We agree with the general doctrine of the federal cases cited. Slight evidence may be sufficient to show negligence, but where, as here, there is really nothing beyond the fact that the building was burned by sparks which, by common knowledge, must to some extent escape from a locomotive hauling a train, there is no evidence which calls for rebuttal."

In the *Garrett case, supra,* the court was composed of Circuit Judges Taft, Lurton and Day. The court said:

"It is urged upon us that in the state of Tennessee, in Burke vs. Railroad Co., 7 Heisk. 451, and Simpson vs. Railroad Co., 5 Lea. 456, the law of Tennessee has been settled in favor of the contention of the plaintiffs in error here that proof of fire from sparks is prima facie evidence of negligence. As we have said, this question is not controlled by any statute in Tennessee, and the rules of evidence in the Federal Court are questions of general law, not controlled by state decisions. We think we must take as our guide in this action the intimation of the Supreme Court of the United States in the Nitroglycerine Case, 15 Wall. 524; 21 L. Ed. 206. In that case a lessor attempted to hold a lessee for damages for injuries to the building leased by the explosion of nitroglycerine while in charge of the defendants. Upon this point the court, speaking by Mr. Justice Field, held as follows:

'This action is not brought upon the covenants of the lease. It is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants. Unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident while engaged in a lawful business. A party charging negligence as a ground of action must

prove it. He must show that the defendant by his act, or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of. * * * Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune. This principle is recognized and affirmed in a great variety of cases—in cases where fire originating in one man's building has extended to and destroyed the property of others; *in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives,* or caused by horses running away, or by blasting rocks, and in numerous other cases which will readily occur to every one.'" (pp. 103-104). (Italics ours).

In *Cincinnati, etc., Ry. Co. v. South Fork Coal Co.,* 139 Fed. 528, also relied upon by the Circuit Court of Appeals of the Ninth Circuit, Judge Lurton gave full effect to the rule announced in the *Garrett case, supra,* saying:

"The presumption from evidence of a fire started by sparks from a railway engine is in many states determined by statute. But at the common law a prima facie case of negligence is not made out by mere evidence that it was started by sparks from a railway engine. The use of such engine being sanctioned by statute, there is no liability for a fire started from sparks unless the sparks were negligently suffered to escape. The ground of action being, therefore, for the negligent escape of sparks, a case is not made out by mere proof that it was started by sparks in view of the fact that some sparks will escape despite the use of appliances to arrest them. Garrett v. Southern Ry. Co., 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645; 13 Am. & Eng. Ency. Law, 507, 508, and cases cited in notes.

> But evidenec of escape of larger sparks than usual, or an unusual number of sparks, has been held prima facie evidence of want of due care." (p. 537).

The rule was again affirmed by the Circuit Court of Appeals of the Sixth Circuit in *Louisivlle & N. R. Co. v. Bell,* 206 Fed. 395 (1913).

Petitioner refers to the case of *Eddy v. Lafayette,* 163 U. S. 456, as authority for its position. This is also an Eighth Circuit case. The trial court instructed the jury that proof of setting of the fire created a presumption of negligence. This court did not consider the question, as it said with reference to the instruction:

> "it is assigned for error in this court that the Circuit Court of Appeals erred in not correcting this error. It is sufficient to say that no exception was taken to this part of the charge in the trial court, nor was it assigned for error in the Circuit Court of Appeals." (p. 466).

It seems unnecessary to review petitioner's discussion of the cases in the Sixth Circuit and its futile attempt to distinguish them. That they are authority for the position of the Circuit Court of Appeals of the Ninth Circuit the quotations given above make perfectly clear.

Counsel seems to distinguish between a *prima facie* case of negligence and the right of a jury to draw an inference of negligence from evidence of the setting of a fire (Petitioner's Brief, pages 18 and 19). Perhaps this somewhat academic distinction can be drawn in theorizing on the law of evidence, but it is a useless distinction here, for the practical rule, as shown by decided cases, is that proof of the setting of the fire is either *prima facie* evidence of negligence that will take a case to the jury and support a verdict, or is no evidence of negligence. The very cases in the Supreme Court of Washing-

ton and in the Circuit Court of Appeals for the Eighth Circuit on which petitioner relies hold that proof of the setting of the fire makes a *prima facie* case of negligence.

The *McCullen case* and the *Garrett case* were both decided in March, 1900, so any conflict that resulted has existed for twenty-eight years. No decision of this court since 1900 suggests that the Circuit Court of Appeals of the Sixth Circuit was wrong in taking as its guide the intimation of this court in the *Nitro-Glycerine case*. In fact, this court has reaffirmed the rule that negligence must be proved. In *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367, a case arising under the Federal Employers' Liability Act, tried in the state courts of Mississippi, this court said:

> "The federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. *The Nitro-Glycerine Case*, 15 Wall. 524, 537; *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 663; *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 487; *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 85." (p. 371).

We submit the decision of the Circuit Court of Appeals of the Ninth Circuit was right and that a writ of certiorari ought not to issue in this case merely to settle a rather doubtful conflict with a decision of the Circuit Court of Appeals of the Eighth Circuit.

Respectfully submitted,

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